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v. *Purnell*,[26] defendant's sheep trespassed on plaintiff's land, where they developed scab, as a result of which they were interned on plaintiff's land along with plaintiff's own sheep. Plaintiff was allowed to recover the whole damage, without proof of *scienter*. *Cox* v. *Burbidge* was distinguished on the ground that there the injury was not, while here it was a "natural" result of the trespass, and on the ground that there the plaintiff had no case for trespass, while here he had such a case with matter in aggravation of the damage. *Cooke* v. *Waring*[27] was distinguished on the latter ground. As to the first ground the artificiality of the uses of "natural" in this connection has been pointed out.[28] About all that can be made out from the decisions is that cases where a recovery has been allowed involve "natural" results, wherefore a recovery; while those in which it was not allowed do not involve such results, wherefore no recovery. As to the other ground, it seems futile to distinguish between an injury to the owner of the land, who could bring an action of trespass *quare clausum*, and one to his mother, living with him on the land, who could not.[29] The strongest argument against liability without *scienter* in these cases is in the dissenting opinion in *Troth* v. *Wills*.[30] But in the case there put of injury to a child of the landowner by a trespassing pet lamb or by a trespassing hen (assuming that the owner of the animal would be liable in trespass for an invasion of another's land by a hen),[31] if it is the duty of the owner of the animal to keep it off of the neighbor's ground, may not the latter reasonably assume that the animal will not be there, and allow the child to act accordingly? Ought we to ask the owner of land to take the risk of another's stray animal which the other is bound to keep off?

Theyer v. *Purnell*, in its result and in refusing to apply *Cox* v. *Burbidge*, is significant as one of many recent cases which are compelling us to revise the nineteenth-century theory of liability.

EFFECT OF OWNERSHIP OF ALL THE STOCK OF ONE CORPORATION BY A SECOND CORPORATION; LIABILITY OF A PARENT CORPORATION FOR THE DEBTS OF A SUBSIDIARY CORPORATION; SUBSIDIARY CORPORATIONS AS AGENTS. — The recent case of *New York Trust Co.* v. *Carpenter*[1] presented the following state of facts: The Wheeling & Lake Erie Railway Company owned a controlling interest in the Wheeling, Lake Erie and Pittsburgh Coal Company. The coal company mined coal which was used as fuel by, or shipped over the lines of, the railway company. Both companies were in the hands of receivers. There were outstanding against the coal company certain mortgage bonds (and also certain

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[26] [1918] 2 K. B. 333.

[27] 2 H. & C. 332 (1863).

[28] MAYNE, DAMAGES, 8 ed., 77. Compare other artificial uses of this word, SALMOND, TORTS, 4 ed., § 61, note 13.

[29] Compare the remarks of Phillimore, J., on an analogous situation in Dulieu *v.* White, [1901] 2 K. B. 669, 684–85.

[30] 8 Pa. Sup. Ct. 1 (1898).

[31] See State *v.* Neal, 120 N. C. 613, 27 S. E. 81 (1897).

[1] 250 Fed. 668 (C. C. A., 6th Circ.) (1918).

obligations entitled to priority over these bonds). Pursuant to a plan of reorganization, a new railway company and a new coal company were created, to which were transferred the properties of the old companies. The new railway company received all the stock of the new coal company, and the bondholders in the old coal company received bonds executed by the new coal company and secured (subject to prior obligations) by a mortgage upon its property.

Pursuant to the plan of reorganization, two contracts were made. A mining company (which was not controlled by the railway company) contracted with the coal company to pay for ten years a royalty on production, with an annual minimum; and the railway company contracted with a trustee for the bondholders of the coal company to pay a certain amount for each ton of coal mined and shipped over its lines. It was expected that the funds so paid would keep down annual charges, discharge the prior obligations, and provide some sinking-fund for the bonds. The only outlet for the coal mined by the mining company was over the lines of the railway company, and the railway company failed to furnish cars sufficient to haul away the coal which the mining company was able to produce. Upon failure of the railway company to supply cars, the mining company mined less than the agreed minimum, and refused to pay to the coal company the agreed royalties. Thereupon there were negotiations between the mining company and the railway company, as a result of which it was agreed that the mining contract should be modified, and a modifying contract was made between the mining company and the coal company, — the coal company acting "by direction" of the railway company.

Later the new railway company and the new coal company passed into the hands of receivers. On litigation instituted for the protection of the bondholders of the coal company, it was first held [2] that the railway company was under an obligation, implied from the plan of reorganization and the circumstances of the case, to furnish sufficient cars to haul away at least the minimum amount which the mining company had agreed to mine by its original contract, and that for its failure so to do, it was liable in damages (which would go to the bondholders), these damages to be computed upon the basis of the sums which would have been paid by the mining company and the railway company under the two reorganization contracts, if a due number of cars had been supplied by the railway company. In other words, the railway company was declared to be liable both on the contract expressly made by it at the time of the reorganization, and also upon a contract impliedly made by it at that time.

Pending the ascertainment of these damages, the mortgage upon the property of the coal company was foreclosed. It brought only enough to satisfy the prior obligations. There was a deficiency judgment for the full amount of the bonds, with interest. The question was then presented whether this deficiency judgment was provable as a claim against the new railway company. The District Court held that it was; the Circuit Court of Appeals held that it was not. The District Court found that the coal company was organized and at all times managed and

[2] Wheeling, etc. R. Co. *v.* Carpenter, 218 Fed. 273 (C. C. A., 6th Circ.) (1914).

controlled by the railway company "as an adjunct to or agency of" the railway company.

A corporation may of course act as agent for the legal unit or units who hold its stock. The relation of agent to principal may arise by reason of any facts sufficient to create that relation under the general rules of law applicable to agents. But the relation of corporation to stockholder is not the relation of agent to principal. A stockholder, *qua* stockholder, is not a principal. When an agent does an act creating a liability to a third person, ordinarily that is not the liability of the agent, but is the liability of the principal alone; and even if the circumstances are such that the third person can subject the agent to liability, he can usually also subject the principal to liability. But when a corporation does an act creating a liability to a third person, ordinarily that liability is the liability of the corporation alone, and is not the liability of its stockholders. On the vital matter of liability for acts done, the relation of corporation to stockholder is not the same, or even similar, to the relation of agent to principal. These two relations are altogether different relations, — the one relation producing results which are the exact opposite of those produced by the other relation. The agent is not liable, and the corporation is liable; the principal is liable, and the stockholder is not liable.

When a corporation is duly created, a legal unit is formed which can incur liabilities which are solely the liabilities of that legal unit. The corporation will be in the control of the stockholders, and through this control the stockholders will benefit by the asserts which the corporation acquires; they will receive dividends from time to time, and upon the dissolution of the corporation they will receive their shares of the assets; the assets, to the extent that they exceed the liabilities, ultimately reach the stockholders. But the converse is not true; the liabilities, to the extent that they exceed the assets, do not ultimately burden the stockholders. This is the most important advantage derived from incorporation, — there is a legal unit controlled by stockholders, so that they ultimately profit by its profit, and yet the liabilities of this legal unit are its liabilities alone.

In *Salomon* v. *Salomon & Co. Ltd.*,[3] Salomon transferred a business to a limited company, and became the owner, absolutely or beneficially, of all the shares which the company issued. The company became insolvent. Vaughan Williams, J., held that Salomon was personally liable for the debts of the company, saying that the company was "a mere nominee of Salomon's; and the case is to be dealt with as if the nominee, instead of being the company, had been some individual agent of Salomon's to whom he had purported to sell this business. In that case the trustee in bankruptcy of the agent would have had a right to make Salomon indemnify the agent against the debts which he had contracted by the direction of his principal. The right of the liquidator is precisely the same." But this reasoning was discredited by the House of Lords, and Salomon was held not liable. "In a popular sense," said Lord Herschell, "a company may in every case be said to carry on business for and on behalf of its shareholders, but this certainly does not in

[3] [1897] A. C. 22.

point of law constitute the relation of principal and agent between them, or render the shareholders liable to indemnify the company against the debts which it incurs."

Where all the stock of a corporation is owned by one human being, the question arises whether there is any objection to such concentration of stock ownership. The usual situation is that creditors look solely to the assets of the corporation for payment, and, in such case, it is immaterial to them how many persons will be entitled to what assets remain after the creditors are satisfied. Therefore legislatures have been slow to prohibit concentration of stock ownership in one person. Where all the stock of a corporation is owned by a second corporation, and such ownership is *intra vires* of the second corporation, the situation is the same as where all the stock is owned by one human being. And there is no more justification for saying that a corporation is the agent of its sole stockholder, than for saying that a corporation is the agent of its many stockholders.

It has already been noted that of course a corporation may become the agent for its stockholder or stockholders by reason of any facts sufficient to create that relation under the general rules of law applicable to agents. Tested by these rules, there were no subsidiary facts in the principal case justifying a finding that the coal company was the agent of the railway company.

There was, however, an admission in the pleadings which should be noticed. The railway company, and its receiver, in their answers admitted that the railway company was "the real lessor" of the coal properties. The bondholders might well urge that, if the railway company was the "real" maker of the lease, then, by like reasoning, it must have been the "real" maker of the bonds. What is reality? There was a legal unit named the coal company; the legal title to the coal properties was vested in it, and no conveyance of those properties, by lease or otherwise, could have been made except by the action of that legal unit. The coal company was controlled by another legal unit, called the railway company, and the action of the coal company was taken because the railway company desired it to be taken, — corporations usually act as those who control them desire them to act. (1) The lease was made by the coal company. (2) The bonds were made by the coal company. (3) The coal company was controlled by the railway company, through ownership of all its stock. All three of these facts were realities. On these facts the question arises whether the fact that the coal company was so controlled by the railway company makes the railway company liable on the bonds made by the coal company. And we have seen that it is of the essence of the corporate franchise that control of a corporation, through stock ownership, does not expose the stockholder or stockholders to liability for the acts of the corporation. The admission that the railway company was "the real lessor" lacked legal certainty and, in any event, was the admission of a legal conclusion.

In dealing with cases similar to the principal case, judges have characterized the controlled corporation by a variety of words or phrases, — "paper company," "alter ego," "alias," "device," "dummy," "nominee," "tool," "instrumentality," "adjunct." But the use, even the

liberal use, of epithets does not constitute argument. Of course a corporation is useful to those who control it, — it acts "for" its stockholders. Now if one legal unit acts "for" a second legal unit, the second legal unit is usually liable for the act of the first unit; the importance of the corporate franchise lies precisely in the fact that, although the corporation acts "for" its stockholders, its stockholders are not liable for its acts. If this distinction is not kept bright, but is clouded by the use of double-meaning words, the law of corporation will lose much, if not most, of its usefulness. The legislative grant of the privilege to control a legal unit, but to be unburdened by the liabilities of that unit, is a matter of substance, and not of mere form.

In the principal case, the bondholders were content in the reorganization to take the bonds of the coal company. They recognized the railway company as a distinct legal unit, and the trustee for the bondholders contracted with the railway company for the payment, not of the bonds in their entirety, but of a fund which it was expected would discharge the prior obligations and provide something toward the payment of the bonds. The bondholders later contended successfully that the railway company was under an implied liability to supply cars, so that the expected fund should be forthcoming. The action of the bondholders in seeking to treat the bonds themselves as the obligations of the railway company was inconsistent both with the bargain made in the reorganization and also with the relief obtained against the railway company in the prior phases of the litigation.

In *Marsch* v. *Southern N. E. R. Corp.*[4] the plaintiff sought to hold the Grand Trunk Railway Company of Canada liable for the breach of a contract which the plaintiff had made with the Southern New England Railroad Corporation, practically all of the stock of which was owned by the first corporation, on the ground that the second corporation, being so controlled, was but the "alter ego" of the first corporation. The Massachusetts court denied, with fitting brevity, the right of the plaintiff to subject the first corporation to liability on this ground.

RATE STATUTE — CHANGE OF DECISION — RIGHT OF CARRIER TO RECOVER EXCESS VALUE OF SERVICES. — A statute prescribing a schedule of maximum rates to be charged for hauling lignite coal was passed in 1907 by the legislature of North Dakota. The carriers declined to comply with it: but their violation was successfully enjoined.[1] On supersedeas the statutory rate did not go into operation until March, 1910, when the Supreme Court of the United States affirmed the decision below. The case was later reopened in accordance with the terms of the Supreme Court's decree "without prejudice." The North Dakota court again held the rates to be reasonable,[2] but on appeal

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[4] 120 N. E. 120 (1918).

[1] North Dakota *ex rel.* McCue *v.* Northern Pacific Ry. Co., 19 N. D. 45, 120 N. W. 869, 216 U. S. 579.

[2] North Dakota *ex rel.* McCue *v.* Northern Pacific Ry. Co., 26 N. D. 438, 145 N. W. 135.